

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2005-000347-001 DT

12/20/2005

HON. MARGARET H. DOWNIE

CLERK OF THE COURT
L. Rasmussen
Deputy

FILED: 12/22/2005

ARIZONA DEPARTMENT OF REVENUE

THOMAS A MCGUIRE JR.

v.

CHRIS L LANG (001)
ARIZONA STATE PERSONNEL BOARD (001)
WANDA F MOORE (001)
JEFF GRANT (001)
GWENDOLYN J HATCHER (001)
STEVE SEPNIESKI (001)
SIMON J BELTRAN (001)

CHRIS L LANG
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CRAIG L MOUSEL

OFFICE OF ADMINISTRATIVE
HEARINGS

ADMINISTRATIVE REVIEW RULING

Plaintiff Arizona State Department of Revenue ("ADOR") appeals from a decision of the Arizona State Personnel Board ("Board") reversing the dismissal of defendant Chris Lang. This court has jurisdiction over this appeal pursuant to the Administrative Review Act, A.R.S. §§ 12-901 *et seq.* The court has considered the record from the administrative agency, as well as the memoranda from the ADOR and the Board. Defendant Chris Lang has not participated in these proceedings from their inception.

On January 14, 2005, Chris Lang was terminated by the ADOR from his position as Appraiser II, grade 18. Lang filed a notice of appeal with the Board. The Board held an evidentiary hearing. The Hearing Officer found that Lang's conduct as an employee constituted neglect of duty and inefficiency under the Arizona Personnel Rules and found that Lang's termination was "for cause" under A.R.S. § 41-770. The Board adopted the Hearing Officer's finding that Lang had neglected his duties and had been inefficient, but it vacated the remainder of the Hearing Officer's findings and conclusions, substituting the following language:

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While there is cause for disciplinary action in this matter, the disciplinary action of dismissal, based on the facts found and adopted, is shocking to one's sense of fairness and is therefore excessive and unfair.

[T]he Appellant's appeal is upheld to the extent that the disciplinary action of dismissal is modified to a demotion to a position selected by the agency but not less than an Appraiser I.

ADOR contends that the Board's action was not supported by substantial evidence and was contrary to law. The Board's position is as follows:

There is no question that Mr. Lang's conduct was cause for disciplinary action. The Board found cause for disciplinary action. The Board, within its statutory authority and guidelines, found that the penalty for disciplinary action merely should be different. Pursuant to A.R.S. § 41-785, the Board has the authority to modify the individual agency penalty or disposition. The Board did so on the basis of the mitigating circumstances of unfairness and the fact that the action chosen was disproportionate to the facts found. The Board further found that the disciplinary action chosen by the agency was shocking to one's conscience.

Board's Answering Memorandum, pp. 1-2.

A.R.S. § 12-910(E) defines the appropriate scope of judicial review:

The court may affirm, reverse, modify or vacate and remand the agency action. The court shall affirm the agency action unless after reviewing the administrative record and supplementing evidence presented at the evidentiary hearing the court concludes that the action is not supported by substantial evidence, is contrary to law, is arbitrary and capricious or is an abuse of discretion.

In determining the propriety of an administrative agency's action, the court reviews the record to determine whether there has been "unreasoning action, without consideration and in disregard for facts and circumstances; where there is room for two opinions, the action is not arbitrary or capricious if exercised honestly and upon due consideration, even though it may be believed that an erroneous conclusion has been reached." *Petras v. Arizona State Liquor Board*, 129 Ariz. 449, 452, 631 P.2d 1107, 1110 (App. 1981), *quoting Tucson Public Schools, District No. 1 of Pima County v. Green*, 17 Ariz. App. 91, 94, 495 P.2d 861, 864 (1972). The appellate court views the evidence in the light most favorable to upholding the agency's decision and will affirm if the decision is supported by any reasonable interpretation of the record. *See Baca v. Arizona Dept. of Economic Security*, 191 Ariz. 43, 951 P.2d 1235 (App. 1998). The court does not function as a "super agency" and may not substitute its own judgment for that of the agency where factual questions and agency expertise are involved. *See DeGroot v. Arizona Racing Comm'n*, 141 Ariz. 331, 686 P.2d 1301 (App. 1984).

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Since the Board's decision was made (and after the briefing was completed in this case), the Arizona Supreme Court decided the case of *Maricopa County Sheriff's Office v. Maricopa County Employee Merit System Comm'n*, 211 Ariz. 219, 119 P.3d 1022 (2005). In that case, the Supreme Court specifically disapproved of the "shocking to one's conscience" standard applied by the Board in the case at bar. It held:

The "shocking" standard, based on perceived disproportionality between the seriousness of the offense and the severity of punishment, is not found in any statute or rule in Arizona and appears to have been a creation of court decisions. The dilemma this standard presents is that to determine whether a disciplinary order is "shocking to one's sense of fairness" calls for subjective analysis, effectively engaging the Commission in a determination of the appropriateness of a disciplinary action as measured against the seriousness of the offense, thereby opening the door to a substitution of the Commission's judgment for that of the MCSO.

The Supreme Court noted that, because the Commission found that *some* measure of discipline was appropriate, it erred in substituting its judgment for that of the employing agency as to the *degree* of discipline:

By imposing a fifteen-day suspension, the Commission obviously believed that some discipline was justified. That being the case, if the discipline originally imposed falls within the permissible range, it would be unlikely the action could be seen as arbitrary. [citations omitted] Similarly, if the record contains credible evidence, either by admission or by sufficient proof, that the employee in fact committed acts warranting some level of discipline, it can scarcely be said that discipline within the permissible range was taken without reasonable cause.

The Court also stressed the importance of deference to the appointing authority's decisions:

Admittedly, reasonable minds may differ on the appropriateness of one discipline over another. That people may differ, however, bolsters the notion that discipline, initially imposed within standards and policies set by the appointing authority, should not be disturbed merely because a reviewing body sees it as disproportionate.

Based on the foregoing, and for the additional reasons cited in plaintiff's opening and reply memoranda, the Board's decision cannot stand. The decision to modify Lang's discipline was not supported by substantial evidence and is contrary to law.

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IT IS ORDERED reversing the decision of the Arizona State Personnel Board. Plaintiff shall lodge a formal order/judgment for the court's signature.